U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: May 29, 1998

Case No. **97 INA 290**

In the Matter of:

MARICOPA MEDICAL CENTER,
Employer,

On behalf of:

FARZAD SAKHA,
Alien

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of FARZAD SAKHA (Alien) by MARICOPA MEDICAL CENTER (Employer) under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On November 8, 1994, the Employer applied for labor certification on behalf of the Alien to fill the position of "Internist, Resident" in its Acute care hospital. The Employer described the position as follows:

> Diagnoses and treats diseases and injuries of internal organ systems. Examines patient for symptoms of organic or congenital disorders and determines nature and extent. Refers for diagnostics. Prescribes medications. Practices under supervision.

AF 123.[2] The position was classified as Internist under Occupation Code No. 070.101-042 in the Dictionary of Occupational Titles. The Education required was an academic degree as Medical Doctor with a Major Field of Study in the Dictionary of Occupational Titles in any specialty. The Other Special Requirement was that the candidate have an Arizona Training Permit (M.D.).[3] One U. S. worker applied for the position, but was not hired. AF 138-150.[4] The Arizona Department of Economic Security determined that this application could not be approved because the job offered was a training position and not a position for a staff physician. Based on the copy of the employment contract submitted with the application, the State agency found that this job would clearly not be open to any qualified U. S. worker as this is not a full-time permanent job, but a position for a residency training program.[5] After the application was amended by the addition of further documentation as to the Alien's status in the medical profession and his contract with the Employer was reexamined, the application was referred to the CO for further proceedings.AF

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[2]The hours were varied in a forty hour week, with overtime as required. The basic pay rate was $33,110 per year.AF 123.

[3]Administrative notice is taken of the Dictionary of Occupational Titles ("DOT"), published by the Employment and Training Administration of the U. S. Department of Labor.

[4]The Alien was a national of Iran. In 1990 he was awarded the degree of M.D., by the University of Istanbul Istanbul, Turkey. He worked for the Employer as an Internist (Resident) from April 1992 to the date of application (given as October 24, 1994, on Form ETA 750 B).

[5]The further comments of the State agency are instructive. Noting that medical residency applications are not processed through the AEC program, the State agency explained that there are other visas available for this purpose. This application did not indicate in the job title that the position was a full-time permanent position for doctor in a particular medical field. This is typically found with a "qualifier," the State agency finding said, and it noted that the Employer included "Resident" in its job title and that the wage would have to be much higher than the rate offered by this Employer, ranging from $75,000 to $115,0000 per year. The State agency then said, "Should employer later extend a full-time job offer for a staff physician for the facility, an application can be submitted (internships and residencies would be completed, Arizona licensure or ability to obtain such would be required.)." AF 172.

161-170.

Notice of Findings. In the Notice of Findings (NOF) issued on May 24, 1996, the CO found (1) that because the prospective employer was not adequately identified the Employer had failed to establish that a current permanent, full time job opening exists to which U. S. workers can be referred adding that there was reason to doubt whether the Employer would be able to place the Alien on its payroll on or before the date of the Alien's proposed entrance into the United States under 20 CFR § 656.20(c)(4). The CO also found (2) that Employer failed to establish that a job opening existed that was clearly open to qualified U. S. workers, based on its admissions in the May 25, 1995, letter by its attorney. AF 60. Finally, the CO found that the Employer failed to attempt to recruit U. S. workers for this position through the National Resident Matching Program list, the source that is likely to produce workers and are customary for the occupation. 20 CFR § 656.21(b). The CO then described the procedures that the Employer must follow to rebut each of these findings.[6]

Rebuttal. The Employer's undated rebuttal received July 1, 1996, addressed the issues identified in the NOF. AF 39-115. The Employer said that the position did exist and was clearly open to qualified U. S. workers. The Employer cited and discussed at length its advertisement of the position in Arizona Medicine, which the Employer said was evidence of the availability of the position to U. S. workers.

Final Determination. After examining the rebuttal, the CO's Final Determination of July 26, 1996, denied Certification. AF 32-37. The CO found unsatisfactory the Employer's explanation for its failure to use the National Resident Matching Program "physician match list" for the placement of medical school graduates, and that the Employer failed to provide evidence that it conducted any recruitment though this facility. The CO concluded that the Employer failed to sustain its burden of proving that good faith recruitment was conducted, and certification was denied for this reason.

Appeal. Employer's appeal of August 16, 1996, as supplemented on August 28, 1996, repeated the rebuttal arguments which the Final Determination had rejected. AF 01-06. The Employer argued that it was no longer possible to use the National Resident Matching Program list for recruitment at the time the NOF was issued, as the 1996 list had become moot by that time. The Employer said that

> All matches are made at the same time for all applicants, with recruitment from September to February and all interviews concluded by February. The 1996 program does not exist. The 1997 program will open in September, and will only accept applicants for June 1997.

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[6]The CO suggested that the Employer correct the deficiency in recruitment by acting through the National Resident Matching Program. AF 118. The Employer was then asked how many applications were in the selection process for the residency program, how many applicants were interviewed, considered and hired, furnishing specific job-related reasons for the rejection of any applicants. Its response has been considered in this decision..

> If the employer had been advised to recruit via the Match List at the time of the Region's intent, they would have gladly complied with such instructions and the timing for such recruitment would have been appropriate.

AF 03. The Employer agreed that it bore the burden of proof to demonstrate its good faith efforts to recruit U. S. workers for this position, but contended that 20 CFR § 656.21(b)(1) allowed it to use as sources for recruitment without limitation "advertising; public and/or private employment agencies; colleges or universities; vocational, trade, or technical schools; labor unions; and/or development or promotion from within the employer's own organization." AF 03. The Employer then discussed at length an exchange of communications in which it asked the CO how to go about recruiting a physician for its residency program in an apparent effort to determine in advance just what measures it might take to perform its duties under the Act and regulations. It was the position of the Employer that its effort to recruit a worker to fill this position depended heavily on such instructions as it sincerely sought from the administering agency and that it was not responsible for its failure to use the National Resident Matching Program in this process. AF 04-06.

Discussion

It is clear that the Employer has burden of proof to demonstrate that it is offering permanent, full time work within the meaning of 20 CFR § 656.3. Moreover, it is well-established that certification may be denied if employer's own evidence does not show that the position is permanent and full time. **Gerata Systems America, Inc.**, 88 INA 344(Dec. 16, 1988). As the issue explained by the Arizona Department of Economic Security was not clearly addressed in the NOF or persuasively answered by the Employer at any point, however, it was not the basis for the CO's denial of certification in the Final Determination of this case. **Loew's Anatole Hotel**, 89 INA 230 (Apr. 26, 1991)(*en banc*). On the other hand, the ramifications of this issue remained the subtext in the NOF, the rebuttal, the CO's Final Determination, and the Employer's Appellate Brief because the Employer's offer was clearly a training position in its residency program and not a job for a staff physician. Representing itself to be a "major affiliated teaching hospital of the University of Arizona College of Medicine, Arizona, State University, and Mayo Graduate School of Medicine," the Employer said that, "Medical students do specialty rotations during their post-graduate medical education and are made aware of the many positions available for a resident program during these rotations."[7] The Employer's own admissions thus provided the facts that supported the CO's finding that the use of placements through the National Resident Matching Program is the accepted procedure by which such teaching hospitals as the University of Arizona College of Medicine and the other institutions Employer listed usually provide continued professional education for medical school graduates upon their completion of a post graduate hospital internship after leaving medical school.[8]

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[7]Employer's discussion on this point at AF 40-41 presented the admissions of fact that support this finding.

[8]See footnote No. 5 *supra*.

Employer does not complain that the State Employment Security Service ("SESA") provided erroneous information. Compare **Inner City Drywall Corp.**, 90 INA 192 (Jun. 24, 1991). Instead, it says that it would have followed the advice of the CO's staff regarding the National Resident Matching Program but for the circumstance that the information was not provided until it was too late, and that it did advertise in a state professional journal, *Arizona Medicine,* to no avail. See AF 40-44, 70-74, 92-96. This argument is not persuasive, as it attempts to shift to the Certifying Officer the burden of proof that the Act and regulations assigned to the Employer.[9] The Employer's ultimate responsibility for good faith recruitment for the position was not shifted by inquiries addressed to the SESA. Aside from any other consideration, we do not find it credible that this "major affiliated teaching hospital of the University of Arizona College of Medicine, Arizona, State University, and Mayo Graduate School of Medicine" was unaware of the existence of the National Resident Matching Program before it received the advice of the State and Federal agencies implementing the Act and regulations. While such an ingenuousness could be contemplated, if an unrepresented employer applied and asserted that the alien was the first foreign worker it ever hired for the position, that assumption is inconsistent with the evidence in this case. The evidence before this Panel clearly supports the inference that this Employer has repeatedly had occasion to hire physicians to work as residents in the past. Accordingly, the inquiries that the Employer repeatedly described in its representations and arguments appear to have addressed a recruitment process that was different from the way it usually hired U. S. workers to fill positions as residents in this institution in the past, in spite of any suggestion to the contrary in the Employer's brief. **Gerata Systems of America, Inc.**, *supra*.[10]

For these reasons, after reviewing the Appellate File we conclude that the evidence supports the CO's finding that the Employer failed to sustain its burden of proof that its recruitment effort for this job opportunity was *bona fide* and that the job is clearly open to U. S. workers.

Accordingly, the following order will enter.

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[9]See 20 CFR § 656.2(b), which quotes ¶ 291 of the Immigration and Nationalities Act, 8 U.S.C. § 1361. Also see legislative history of the 1965 Amendments to the Act where Congress expressed its intention that the burden of proof for establishing entititlement to alien labor certification shall be on the employer seeking alien's entry for permanent employment. See S. Rep. No 748, 89th Cong., 1st Sess., as reprinted in 1965 U. S. Code Cong. & A
d. News 3333-3334.

[10]It is appropriate to observe in this context that the Employer did not explain how it filled the position of hospital resident in the past in this record, and that it did not indicate that it ever disclosed its normal recruiting procedure for this job to either the State agency or the CO at any point when it was inquiring as to the methods of recruitment it was to use under the Act and regulations. In this respect we note that a bare assertion without supporting reasoning or evidence is not sufficient to carry an employer's burden of proof, noting that BALCA has held that statements without explanation or factual support are not persuasive proof. **Interworld Immigration Service**, 88 INA 490(Sept. 1, 1989), citing **Tri-P's Corp.**, 88 INA 686(Feb 17, 1989).

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER

Judge Lawson dissented from the conclusion and decision of the Panel.

ALJ Lawson DISSENTING

I dissent because the record demonstrates that employer continuously solicited information from the CO and reasonably thought that it had the CO's approval for the means of job advertising utilized. Furthermore, employer has demonstrated that its method of advertising would be at least a reasoable alternative, if not indeed the preferred method, and that under the circumstances of delay engendered by the CO it was the only available alternative. (AF 2-6).

The employer met its burden of good faith recruitment. The alien should be certified.

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JAMES W. LAWSON
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within twenty days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis

for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within ten days of service of the petition and shall not exceed five, double-spaced, type-written pages. Upon the granting of the petition the Board may order briefs.